



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 11, 1995

Ms. Lan P. Nguyen  
Assistant City Attorney  
City of Houston  
Legal Department  
P. O. Box 1562  
Houston, Texas 77251-1562

OR95-554

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30022.

The City of Houston ("the city") received a request for information relating to an investigation of certain city inspectors. You say the city has released all information that is responsive to this request with the exception of one document, a memorandum from Mr. Benjamin L. Hall, III, City Attorney, to Mr. Jimmie Schindewolf, Director of City of Houston Public Works and Engineering. You inform us that "[t]his particular document was inadvertently released to another requestor, Mr. Wayne Dolcefino of Channel 13, on October 13, 1994, due to a clerical error that occurred in the process of copying requested material under the Open Records Act." You state that the document at issue "was not knowingly and not voluntarily produced to Mr. Dolcefino by the city. It was inadvertently released as part of a production of over 700 pages of documents through a clerical error." You now seek to withhold this document from required public disclosure under section 552.107(1) of the Government Code.

Section 552.107(1) states that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Although section 552.107(1) appears to except information within rule 1.05 of the Texas State Bar Disciplinary Rules of Professional Conduct, the rule cannot be applied as broadly as written to information that is requested under the Open Records Act. Open Records Decision No. 574 (1990) at 5. To prevent governmental bodies from circumventing the Open Records Act by transferring information to their attorneys, section 552.107(1) is limited to material within the attorney-client privilege for confidential communications.<sup>1</sup>

Thus, section 552.107(1) of the Government Code incorporates a body of law outside of the Open Records Act, the attorney-client privilege in the Texas and federal rules of evidence, as interpreted by state and federal courts. *See* Open Records Decision No. 630 (1994) at 3. Rule 503(b) of the Texas Rules of Civil Evidence provides that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client” between various enumerated communicants, including communications between the attorney and the client. We believe that the memorandum at issue is a privileged attorney-client communication. However, the question is whether the city waived the privilege by inadvertently releasing the memorandum to the public.

Rule 511 of the Texas Rules of Civil Evidence, which concerns waiver of a privilege, provides in part as follows:

A person whom these rules confer a privilege against disclosure waives the privilege if (1) he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.<sup>2</sup> (footnote added).

The Texas Supreme Court has stated that a party seeking to preserve the attorney-client privilege after disclosure must establish that the disclosure of the documents was involuntary. *See Granada Corporation v. Honorable First Court of Appeals*, 844 S.W.2d 223 (1992). The inadvertent disclosure of documents is not necessarily involuntary; “voluntary” disclosures are not limited to those that are made intentionally and knowingly. *See id.* at 226-227; *Freeman v. Bianchi*, 820 S.W.2d 853, 861 (Tex. App.—Houston [1st Dist.] 1991, no writ). Disclosure is involuntary only if an evaluation of all the circumstances of the disclosure confirms that it was involuntary. *See Granada Corporation* 844 S.W.2d at 226. Factors to be considered in determining whether

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<sup>1</sup>“Unprivileged information” as defined by rule 1.05 of the Texas State Disciplinary Bar Rules of Professional Conduct is not excepted under section 552.107(1). Open Records Decision Nos. 630 (1994) at 3 n. 4; 574 (1990) at 5.

<sup>2</sup>We do not consider the disclosure to Mr. Dolcefino to be privileged. *See* Tex. Rule Civ. Evid. 503(b).

a disclosure is involuntary include the precautionary measures taken to prevent disclosure, the delay in rectifying the error of disclosure, the extent of any inadvertent disclosure, and the scope of discovery. *See id.*

You have not provided us with sufficient information about the circumstances of the disclosure of the requested information to enable us to determine whether the disclosure was involuntary. You have not explained the "clerical error" that caused the disclosure. Nor have you provided information about the other factors in *Granada Corporation* that we must evaluate to determine whether the disclosure was involuntary. Please provide this information within 7 days of receipt of this letter. We will consider a failure to timely provide this information to this office a waiver of section 552.107(1) of the Government Code.<sup>3</sup>

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions, please contact our office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/KKO/rho

Ref.: ID# 30022

Enclosures: Submitted document

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<sup>3</sup>We note that section 552.007 of the Government Code provides that once a governmental body has "voluntarily" disclosed information to the public, it must make that information available to any person. We believe that the information we have requested about the circumstance of the disclosure will also enable us to determine whether the city has voluntarily disclosed the memorandum for purposes of section 552.007 of the Government Code. *Compare* Open Records Decision Nos. 376 (1983) (finding no voluntary release under predecessor provision of section 552.007 where information was released through no official action and against the wishes and policy of governmental body); Open Records Decision No. 454 (1986) (finding no voluntary release under predecessor provision of section 552.007 where release is compelled by law and governmental body believed it was constitutionally required to release information) *with* Open Records Decision No. 387 (1983) at 4 (finding information would be voluntarily disclosed if governmental body failed to attempt to retrieve illegally transferred information)

cc: Mr. Tom A. Dickens  
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(w/o enclosures)